BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAKE LEWIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,810
SUN GRAPHICS, INC.	)	
Respondent	)	
AND	)	
	)	
FREMONT COMPENSATION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the January 26, 2009, Review and Modification of Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was denied a modification of the April 16, 2003, Stipulated Running Award entered into by the parties after the ALJ determined that any change in claimant's condition was the result of a new series of injuries to his upper extremities and not the natural and probable consequence of the injuries suffered by claimant on October 9, 2000.

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Review and Modification of Award of the ALJ. The Board heard oral argument on April 17, 2009.

ISSUES

1. Is claimant entitled to a modification and increase of the April 16, 2003, Stipulated Running Award?

2. If claimant is entitled to a modification and increase of the April 16, 2003, Stipulated Running Award, what is the nature and extent of that modification? Claimant argues

that he is entitled to additional permanent partial disability compensation or an award for a permanent total disability.

FINDINGS OF FACT

Claimant suffered a repetitive use injury while working for respondent, with a stipulated date of accident of October 9, 2000. The parties entered into a Stipulated Running Award on April 16, 2003, which awarded claimant a 13 percent permanent impairment of function to the body as a whole. This agreed impairment was a compromise between the 32 percent body as a whole rating of board certified physical medicine and rehabilitation specialist, Pedro A. Murati, M.D., and the 8.8 percent body as a whole impairment rating of board certified orthopedic surgeon, J. Mark Melhorn, M.D. The Award left open all rights and remedies of both parties under the Kansas Workers Compensation Act (Act).

Claimant began working for respondent in 1968 and, over a 38-year period, he has performed nearly every job at respondent's plant. His primary field is in printing work. This work led to the original bilateral wrist and bilateral elbow injuries which were the subject of the original running award. Claimant was diagnosed with bilateral carpal tunnel syndrome and bilateral ulnar nerve at the elbows. On one occasion, claimant did describe symptoms regarding the bilateral shoulders and neck. However, these complaints resolved. At the time of the final examination, claimant had no complaints to his shoulders or neck. Claimant underwent surgery on his right wrist and elbow on May 28, 2002, and on his left wrist and elbow on June 11, 2002, all under the care of Dr. Melhorn. Claimant was released to return to work without restrictions by Dr. Melhorn on August 30, 2002. When claimant first returned to work, claimant's supervisor, David Martin, was cautious about what job he had claimant do. However, soon, it was business as usual. Claimant was not able to self limit himself, and he continued in the print shop until September 2006, when he injured his back.

On September 14, 2006, claimant suffered another injury, this time to his low back. That injury was filed separately and assigned Docket No. 1,031,707. Claimant testified that he suffered the injury while putting a stack of calendars on a skid and experienced a burning sensation across his low back. That matter went to preliminary hearing, and claimant was awarded preliminary benefits by the ALJ. Claimant initially received treatment for the low back injury with Thomas A. Rose, M.D. However, a Board Member reversed the preliminary order, finding that claimant had failed to provide respondent with timely notice of that accident as required by K.S.A. 44-520. Claimant attempted to return to work for respondent after the back injury, but the restrictions provided by Dr. Rose for the back injury were not accommodated by respondent. Claimant was formally notified on April 3, 2007, that respondent did not have a position for him. Claimant testified that he had the ability to perform some work for respondent, including that of supervisor, but the

opportunity was not available. Claimant did not secure any other work after his termination from respondent. He applied for Social Security disability benefits and began receiving the benefits in March 2007.

Claimant's discovery deposition was taken on January 24, 2008. At that time, he stated that his arms had gotten progressively worse since he returned to work after the running award. At the time of the review and modification hearing, he continued to experience problems with his arms. Also, his neck had worsened since the original 2000 injury. Dr. Murati had originally found that claimant suffered from occasional neck stiffness in 2002, with mild disc bulging at C5-6 and C6-7. Claimant was diagnosed with left cervical radiculopathy and rated at 15 percent to the whole body for the cervical problems. This impairment was included in Dr. Murati's 32 percent whole body rating. After claimant returned to work in 2002, he continued performing his regular job for respondent and agreed that he never asked for treatment for his neck. Claimant also did not ask for additional treatment for his upper extremities during the 4-year period from 2002 to September 2006. However, between 2003 and September 2006, claimant did take over-the-counter pain medication.

David Martin, respondent's vice president of operations, testified that claimant returned to work without restrictions after the upper extremity surgeries. Claimant returned to his regular job and worked until September 2006. At that time, claimant was unable to continue working due to the limitations placed on his lifting, standing, stooping and other restrictions from claimant's low back injury. But for the restrictions imposed on claimant's low back, claimant would still be working for respondent.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Michael H. Munhall, M.D., on February 5, 2008. The evaluation encompassed claimant's neck and bilateral upper extremities. Claimant was diagnosed with neck pain and bilateral hand weakness and numbness. Claimant described good results from the surgeries by Dr. Melhorn. However, after returning to work for respondent, his hand weakness returned, with the right being worse than the left. He also had a return of numbness in his right hand and tingling in the left hand.

Claimant was again examined by Dr. Munhall on June 30, 2008. Claimant described intermittent cervical spine pain, bilateral hand weakness and numbness and right shoulder fatigue and intermittent aching. He was diagnosed with cervical derangement syndrome, right shoulder impingement syndrome and left shoulder dysfunction syndrome. Dr. Munhall determined that claimant's diagnoses and injuries are causally related to the October 9, 2000, accident and also each and every working day thereafter through April 3, 2007, with his employment with respondent. Claimant was rated with an additional 6 percent impairment to his right shoulder for the impingement syndrome, and 3 percent to the left upper extremity for evolving left shoulder complex dysfunction. These impairment percentages are in addition to the previous 32 percent whole body impairment from Dr. Murati. In reviewing the task list prepared by vocational expert

Karen Terrill, Dr. Munhall determined that claimant had suffered a task loss of 50 percent as the result of the injuries to claimant's upper extremities and cervical spine. Ms. Terrill, in her report of February 20, 2008, determined that claimant was no longer able to engage in his past work and had no readily transferable skills. Thus, in her opinion, claimant was essentially and realistically unemployable.

Claimant was evaluated by vocational expert Steve Benjamin on September 3, 2008. Mr. Benjamin determined that claimant retained the ability to earn between $258.40 and $320.40 per week as a retail clerk, home attendant, security guard or school bus driver. He acknowledged that claimant was not seeking work and, thus, had a wage loss of 100 percent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[4]

The only current medical opinion regarding claimant's ongoing injuries comes from Dr. Munhall, who determined that claimant suffered a progressive worsening of his neck and bilateral upper extremity problems while continuing to work for respondent. Dr. Munhall related the origin of these problems to the original injuries suffered on October 9, 2000. In his deposition, Dr. Munhall testified as follows:

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[1] K.S.A. 44-501 and K.S.A. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 44-501(a).

[4] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

Q. [by claimant's attorney] Okay. Specifically, as respects Mr. Lewis' original injuries which you originally evaluated on February 5 of 2008 and then again on June 30 of 2008, what was your diagnosis of the injuries that you felt he was still suffering as a result of his original October 9, 2000 injury?

A. [by Dr. Munhall] Cervical derangement syndrome, components of peripheral nerve entrapment involving bilateral median and ulnar nerves.

Q. Did you identify those particular diagnoses in your report of June 30, 2008?

A. Under "Impression," I listed "cervical derangement syndrome," identified two additional diagnoses that had become apparent since I saw Mr. Lewis on 2/5/08.

Q. With respect to Mr. Lewis' original October 9, 2000, injury, did you have an opinion whether there had been some progression and worsening of his original October 9, 2000, injury?

. . . .

A. Yes, I think there has been.

Q. And as a result of that, at least in your opinion, progression or worsening of his original injury, did you find that he had in fact then sustained increased impairment as you've identified?

A. Yes.

Q. And specifically, the impairment that you've noted, it that found on page 4 of your June 30, 2008 report?

A. Yes, it is.

Q. In addition to the impairment that you have noted, did you assign then some permanent restrictions about which you felt should be assigned as it would specifically relate to his original October 9, 2000 injury, as it has now progressed and worsened over time?

A. Yes.

The Board finds that claimant did suffer additional injuries relating to his employment with respondent, and those injuries are the natural consequence of the original injuries.

K.S.A. 44-528, the review and modification statute, allows for a modification of an award if,

> . . . the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished . . . .[5]

Claimant's functional impairment has increased as opined by Dr. Munhall. Claimant has a 6 percent impairment to his right upper extremity and a 3 percent impairment to his left upper extremity, both representing increases over the ratings provided at the time of the running award on April 16, 2003.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[6]
>
> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[7]

Claimant contends that he is permanently and totally disabled pursuant to the opinion of Ms. Terrill. However, Mr. Benjamin paints a different picture. The Board finds that claimant has been shown to have a wage earning ability as noted above. As claimant retains the ability to engage in substantial and gainful employment, he is not permanently and totally disabled. Therefore, a determination must be made as to claimant's additional permanent partial disability claimant suffered as the result of the additional impairment through his last day worked for respondent, and as a direct result of the injuries suffered on October 9, 2000. The only task loss opinion contained in this record is that of Dr. Munhall, who found claimant to have suffered a 50 percent loss of tasks. The Board adopts that opinion.

K.S.A. 44-510e also requires that the Board determine the difference between the average weekly wage a worker was earning at the time of the injury and the average

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[5] K.S.A. 44-528(a).

[6] K.S.A. 44-510e.

[7] K.S.A. 44-510c(a)(2).

weekly wage the worker is earning after the injury. Here, claimant is not looking for work and, thus, his income is zero. This represents a 100 percent loss of wages.

Historically, K.S.A. 44-510e, as explained by case law, required that the Board determine whether a claimant had put forth a good faith effort to find work after leaving respondent. However, the Kansas Supreme Court, in its September 4, 2009, decision in *Bergstrom,*[8] determined that the good faith element of *Foulk*[9] and *Copeland*[10] was not a specific requirement of K.S.A. 44-510e. The Court held that, when a statute is plain and unambiguous, the courts must give effect to its express language, rather than determining what the law should or should not be. As K.S.A. 44-510e contains no good faith requirement on claimant's part, that element of the prior case law has no application in workers compensation litigation in Kansas. Therefore, the Court held that the good faith element of the prior cases is disapproved and a claimant's actual wage loss is to be used in considering the extent of permanent partial disability suffered as the result of an injury. Here, claimant has no job. Therefore, he has no income, and his wage loss is 100 percent. In averaging the task loss of 50 percent with the 100 percent wage loss, the Board finds that claimant has suffered a 75 percent permanent partial general disability. The Review and Modification Award of the ALJ will be modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed and a finding entered that claimant suffered additional injuries through his last day of employment for respondent, with those injuries being the natural consequence of the original accident on October 9, 2000. Claimant has suffered additional functional disability to the right upper extremity of 6 percent and to the left upper extremity of 3 percent. Claimant is also entitled to a permanent partial general disability of 75 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification of Award of Administrative Law Judge Thomas Klein dated January 26, 2009, should be, and is hereby, reversed and claimant is awarded a 75 percent permanent partial general disability for the injuries suffered while employed

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[8] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, ___ P.3d ____ (2009) (No. 99,369, 2009 WL 2834485, filed Sept. 4, 2009).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

with respondent, with the injuries and disability being the natural consequence of the original injuries suffered on October 9, 2000.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jake Lewis, and against the respondent, Sun Graphics, Inc., and its insurance carrier, Fremont Compensation Insurance Company, for an accidental injury which occurred October 9, 2000, and based upon an average weekly wage of $798.23, for a 75 percent permanent partial general disability.

Claimant is entitled to 13.14 weeks of temporary total disability compensation at the rate of $401.00 per week totaling $5,270.28, followed by 53.95 weeks permanent partial disability compensation at the rate of $401.00 per week totaling $21,633.95 for a 13 percent permanent partial disability, followed by permanent partial disability compensation at the rate of $401.00 per week effective September 14, 2006, not to exceed a total award of $100,000.00 for a 75 percent permanent partial general disability.

As of September 24, 2009, there is due and owing claimant 13.14 weeks of temporary total disability compensation at the rate of $401.00 per week or $5,270.28, followed by 212.09 weeks of permanent partial disability compensation at the rate of $401.00 per week in the sum of $85,048.09, for a total of $90,318.37, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $9,681.72 shall be paid at the rate of $401.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Claimant returned to work and performed his regular job duties without accommodation. As a result, he continued to suffer micro-traumas and repetitive use injuries. Claimant's worsened condition is the result of the same work that caused his original injuries. This constitutes a new series of accidents. His current condition is not a natural consequence of his original injuries. Rather, it is the result of his subsequent work activities and should be compensated as a new series of accidents.

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge